

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 048563-02

Christopher McCarthy
M.B.T.A.
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Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Carroll, McCarthy and Fabricant)

APPEARANCES

Joseph M. Burke, Esq., for the employee
Stephen W. Sutton, Esq., for the self-insurer at hearing and on brief
Gregory G. Skouteris, Esq., for the self-insurer on brief

CARROLL, J. The self-insurer appeals from a decision in which an administrative judge concluded that a penalty for late payment of his § 10A conference order was due under the provisions of G. L. c. 152, § 8(1).¹ The self-insurer argues that the employee's use of sick time for a period of incapacity – later ordered by the judge as work-related – allowed the self-insurer to unilaterally reduce its payment due the employee under that order by crediting back the amount previously paid the employee as sick time. Because the self-insurer's argument runs counter to our well-established and strict construction of § 8(1), we disagree and affirm the decision.

The relevant facts are as follows. The employee fell and twisted his knee while replacing railroad ties at work on September 6, 2002. He reported the

¹ General Laws c. 152, § 8(1), provides, in pertinent part:

Any failure of an insurer to make all payments due an employee under the terms of an order, decision, arbitrator's decision, approved lump sum or other agreement . . . within fourteen days of the insurer's receipt of such document, shall result in a penalty of two hundred dollars, payable to the employee to whom such payments were required to be paid by the said document; provided, however, that such penalty shall be . . . ten thousand dollars if not made within ninety days.

Christopher McCarthy
Board No. 048563-02

incident, but continued working during the next several months, in spite of pain and medical treatment. An MRI revealed a torn cartilage in his knee, for which surgery was recommended. The self-insurer denied coverage for the proposed treatment. The employee worked up to the day of surgery, February 12, 2003, and remained out of work until May 8, 2003. (Dec. 433.) While out of work the employee used forty-seven (47) sick days and twenty-five (25) vacation days to maintain his income, as the self-insurer had not accepted his workers' compensation claim. (Dec. 435.) He then returned and worked without incident. (Dec. 433.)

The employee filed the present claim for workers' compensation benefits, which went before the judge for a § 10A conference on July 15, 2003. The judge ordered that the self-insurer pay the employee temporary total incapacity benefits for the claimed period. The self-insurer appealed the order to a full evidentiary hearing. Prior to the commencement of the hearing, the employee was allowed to join a claim for a § 8(1) penalty. (Dec. 432.)

The judge's conference order directed the self-insurer to pay the employee back § 34 benefits totaling \$10,132.19. However, rather than pay that amount as ordered, the self-insurer reimbursed the employee's "sick bank account," by returning 60% of the forty-seven sick days that he had used during his recuperation.² As a result, the self-insurer paid only \$535.54 of the \$10,132.19 ordered to be paid to the employee as a result of the § 10A conference proceeding. (Dec. 435.) It is the propriety of the self-insurer's action that is before us on appeal.

The self-insurer argued at hearing – and continues to argue on appeal – that the employee's claim for payment of the workers' compensation benefits ordered at conference would amount to a double recovery. See Mizrahi's Case, 320 Mass.

² The employee was allowed, pursuant to the employer's personnel policy, to use sick time to make up the 40% difference between the § 34 payments and his full wage.

733 (1947). The self-insurer reasons that the § 34 benefits ordered (\$10,132. 19) would be 60% over and above the sick pay the employee already received during the post-surgery period of incapacity. Thus, the self-insurer considers that the employee would have received 160% of his benefits entitlement had it paid the § 34 benefits as ordered. (Dec. 436-437.)

The judge disagreed, and awarded the employee a \$10,000 penalty for late payment of the conference order, pursuant to the provisions of § 8(1). (Dec. 442-443.) See n.1, supra.

We need not review the detailed discussion of “double recovery” set out in the decision, (Dec. 435-442), because we consider the topic and premise to be wholly beside the point. This is a straightforward § 8(1) case about the failure of the self-insurer to make “all payments due an employee” under the explicit terms of a conference order. There is nothing in § 8(1), or in our several cases construing that section of the statute, that legitimately could have led the self-insurer to take the unilateral and unauthorized action that it took in this case. We therefore affirm the decision for the reasons that follow.

An excerpt from the self-insurer’s brief illustrates its misunderstanding of the law that spawned this § 8(1) penalty. Upon receipt of the conference order, the self-insurer

initially reimbursed the Employee’s sick leave bank and paid him the difference of \$535.54 because the Employee had already received 100% of his wages and therefore had been made whole. *The Self-Insurer perceived the Conference Order as merely awarding a credit for payments it already forwarded on account of, or in lieu of, the worker’s [sic] compensation benefits.*

(Self-insurer br. 9; emphasis added.) Our review of the conference order (see Rizzo v. M.B.T.A., 16 Mass. Workers’ Comp. Rep. 160 n.3 [2002]) reveals that nothing of the sort was ordered therein. As such, what the self-insurer “perceived” the award to be under the conference order was not grounded in the facts or the law.

The present case falls squarely within our decisions stating that a § 8(1) penalty attaches when an insurer fails to make a payment due to an employee under the terms of one of the delineated § 8(1) documents. We have deliberately construed the statute as one of strict liability, as long as the statutory elements are met. Once applicable, we apply the statute narrowly, as is the requirement for penalty statutes in general. See Pacellini v. Cape Cod Fireplace Shop, 17 Mass. Workers' Comp. Rep. 394, 402-403 (2003) and cases cited. In other words, whatever payment the document orders an insurer to pay to the employee must be timely paid. The self-insurer could *not* unilaterally adjust the order to its pleasing, regardless of the arguable equities of the situation. To hold otherwise would be to expand by judicial fiat the § 8(2) list of specific instances in which an insurer can unilaterally discontinue benefit payment, an action we are loath to take. See Taylor's Case, 44 Mass. App. Ct. 495(1998).

Nonetheless, recognizing the general concern regarding double recovery that this case superficially presents,³ we will not forge a special rule to relieve the self-insurer of its obligations under the act.⁴ Our construction of the penalty

³ The imposition of a \$10,000 penalty against a publicly funded entity for failure to make a closed period payment of benefits due the employee under the circumstances of this case may strike some as an inordinate use of resources. However, the parties stipulated at oral argument that accrued sick time is paid back to an employee upon retirement at full value as of the time of retirement. Therefore, if the stipulation is correct, the sick time taken by the employee while waiting for his workers' compensation case to go through dispute resolution eventually would be paid to the employee, in any event. Thus the foundation upon which the self-insurer's double recovery theory is built necessarily crumbles. There was only one "recovery": the workers' compensation benefits ordered by the judge.

⁴ For the first time, at oral argument, the self-insurer advanced the argument that its status as a *self*-insurer is what distinguishes it from the general rule that offsets, unauthorized by a specific statutory provision, are not favored under Chapter 152. See Gould's Case, 355 Mass. 66, 70-72 (1968)(court reversed order allowing offset of compensation benefits for payments made from private disability plan). The reason for this is apparently that dispute resolution should not concern itself with the different pockets out of which a self-insurer can make payment to an injured employee, since it all comes from the same ultimate source. Noting that there is no distinction drawn between insurers and self-insurers in the definitional § 1(7), we decline to carve out an exception

Christopher McCarthy
Board No. 048563-02

provisions of § 8(1) beginning with Diaz v. Western Bronze Co., 9 Mass. Workers' Comp. Rep. 528 (1995) – has been consistent as to the most important operative factor for the application of the statute: “The ‘payments’ [for which penalties may accrue] in the enacted form of § 8(1) are ‘due the employee’ within the narrow meaning of that phrase – they are ‘required to be paid’ to that employee.” Id. at 533. Those payments include any amounts “due an employee under the terms of an order.” Favata v. Atlas Oil Corp., 12 Mass. Workers' Comp. Rep. 12 (1998). That is all that is required. When the insurer receives an order to pay the employee any amount, the insurer must pay that amount. Payments not payable to the employee do not trigger § 8(1). See, e.g., Diaz, supra (medical benefits due a provider not within scope of § 8(1)); Pacellini, supra (no § 8(1) penalty for failure to reimburse § 11A fee where such was not ordered). We believe the foregoing construction to be predictable and consistent.

Accordingly, the decision is affirmed. Pursuant to §13A(6), employee's counsel is awarded a fee of \$1,312.21.

So ordered.

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

to the strict payment provisions of § 8(1) for self-insurers, including those that are publicly funded. We note that the Gould rule comports nicely with our construction of § 8(1).